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05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 KATHRYN CASEY, ) CASE NO. C06-1644-JLR-MAT  
08 Plaintiff, )  
09 v. ) REPORT AND RECOMMENDATION  
10 MICHAEL J. ASTRUE, ) RE: SOCIAL SECURITY  
Commissioner of Social Security ) DISABILITY APPEAL  
11 Defendant. )  
12 \_\_\_\_\_ )

13 Plaintiff Kathryn Casey proceeds through counsel in her appeal of a final decision of the  
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied  
15 plaintiff's application for Disability Insurance (DI) benefits after a hearing before an Administrative  
16 Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all  
17 memoranda of record, it is recommended that this matter be REMANDED for further  
18 administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1949.<sup>1</sup> She has a General Equivalency Degree and completed  
21 \_\_\_\_\_

22 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with the  
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 two years of college. Plaintiff previously worked as a cashier, molder, and small product  
02 assembler.

03 Plaintiff filed her application for DI benefits in April 2003, alleging disability since July 11,  
04 2002. (AR 54-56.) Her application was denied at the initial level and on reconsideration and she  
05 timely requested a hearing. On November 10, 2004, ALJ Verrell Dethloff held a hearing, taking  
06 testimony from plaintiff. (AR 319-38.) On February 6, 2005, ALJ Dethloff issued a decision  
07 finding plaintiff not disabled. (AR 18-29.)

08 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on  
09 September 2, 2006, making the ALJ's decision the final decision of the Commissioner. (AR 5-8.)  
10 Plaintiff appealed to this Court. Upon plaintiff's request, the Court held oral argument in this  
11 matter on June 13, 2007.

### 12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining  
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
17 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not  
18 engaged in substantial gainful activity since her alleged onset date of disability. At step two, it  
19 must be determined whether a claimant suffers from a severe impairment that limits one's ability  
20 to work. The ALJ found plaintiff's brain tumor and residual mental limitations resulting from her

21 \_\_\_\_\_  
22 official policy on privacy adopted by the Judicial Conference of the United States.

01 brain surgery not severe, but found the combination of degenerative disease of the cervical spine,  
02 left shoulder impingement syndrome, obesity, and a history of a seizure disorder severe. Step three  
03 asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that  
04 plaintiff's impairments did not meet or equal the criteria for any listed impairment. If a claimant's  
05 impairments do not meet or equal a listing, the Commissioner must assess residual functional  
06 capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to  
07 perform past relevant work. The ALJ assessed plaintiff's RFC and found that she retains the  
08 ability to perform her past relevant work as a cashier. If a claimant demonstrates an inability to  
09 perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that  
10 the claimant retains the capacity to make an adjustment to work that exists in significant levels in  
11 the national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to step  
12 five.

13 This Court's review of the ALJ's decision is limited to whether the decision is in  
14 accordance with the law and the findings supported by substantial evidence in the record as a  
15 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
16 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
17 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
18 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
19 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
20 2002).

21 Plaintiff argues that the ALJ erred when he determined she had no limitations in her ability  
22 to reach or handle, contrary to the opinions of treating and examining physicians, failed to give

01 clear and convincing reasons for rejecting her testimony or germane reasons for rejecting the lay  
02 witness testimony, and that his determination that she had past relevant work as a cashier is not  
03 supported by substantial evidence. She requests that the Court reverse the Commissioner's  
04 decision and remand this case for payment of benefits. The Commissioner argues that the ALJ's  
05 decision is supported by substantial evidence and should be affirmed.

06 The Court has discretion to remand for further proceedings or to award benefits. *See*  
07 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits  
08 where "the record has been fully developed and further administrative proceedings would serve  
09 no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

10 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient  
11 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that  
12 must be resolved before a determination of disability can be made; and (3) it is clear  
from the record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

13 *Id.* at 1076-77. In this case, the Court finds further administrative proceedings warranted.

#### 14 Physicians' Opinions

15 In general, more weight should be given to the opinion of a treating physician than to a  
16 non-treating physician, and more weight to the opinion of an examining physician than to a non-  
17 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted  
18 by another physician, a treating or examining physician's opinion may be rejected only for "clear  
19 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).  
20 Where contradicted, a treating or examining physician's opinion may not be rejected without  
21 "specific and legitimate reasons' supported by substantial evidence in the record for so doing."  
22 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

01 “Where the Commissioner fails to provide adequate reasons for rejecting the opinion of  
02 a treating or examining physician, [the Court credits] that opinion as ‘a matter of law.’” *Lester*,  
03 81 F.3d at 830-34 (finding that, if doctors’ opinions and plaintiff’s testimony were credited as true,  
04 plaintiff’s condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir.  
05 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true,  
06 the evidence supports a finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec.*  
07 *Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) (“When the lay evidence that the ALJ rejected is given  
08 the effect required by the federal regulations, it becomes clear that the severity of [plaintiff’s]  
09 functional limitations is sufficient to meet or equal [a listing.]”); *Smolen*, 80 F.3d at 1292 (ALJ’s  
10 reasoning for rejecting subjective symptom testimony, physicians’ opinions, and lay testimony  
11 legally insufficient; finding record fully developed and disability finding clearly required).

12 However, courts retain flexibility in applying this “‘crediting as true’ theory.” *Connett v.*  
13 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there  
14 were insufficient findings as to whether plaintiff’s testimony should be credited as true). As stated  
15 by one district court: “In some cases, automatic reversal would bestow a benefits windfall upon  
16 an undeserving, able claimant.” *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp.  
17 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith  
18 error, in that some of his stated reasons for rejecting a physician’s opinion were legally  
19 insufficient).

20 A. Treating Physician Dr. Sjardo Stenecker

21 Plaintiff argues that the ALJ failed to properly assess the opinions of her treating physician,  
22 Dr. Sjardo Stenecker, who consistently found her unable to work at her job as a molder or to

perform any job duties. (See AR 195, 205, 218, 221, 224, 228, 238, 242-43.) In discussing Dr. Steneker's opinions, the ALJ found as follows:

The claimant has not submitted any medical records documenting her physical condition prior to January 2003. On January 31, 2003, she was evaluated by her primary care physician, Sjardo Steneker, M.D. The claimant complained of neck discomfort and pain radiating into her upper extremities, which she related to her L&I injury. Dr. Steneker diagnosed the claimant with cervical strain and radiculopathy in the upper extremities and stated that as a result of these injuries the claimant is not employable. A physical examination performed on February 11, 2003 showed normal muscle strength in the upper and lower extremities, normal reflexes, normal hand grip strength, and normal straight leg raise testing.

Despite the normal results, Dr. Steneker completed a physical capacity evaluation stating the claimant cannot lift more than 5 pounds or sit and stand for more than 1 hour in an 8 hour workday. I accord zero weight to the opinions of Dr. Steneker due to the complete lack of support provided. Opinions may properly be disregarded where clinical and laboratory findings furnished by the treating physician do not support the opinions tendered.

In 2003, the claimant was treated conservatively with physical therapy and range of motion exercises at home. During her follow up evaluations with Dr. Steneker, the claimant continued to have multiple somatic complaints, but almost no objective evidence of any impairments other than muscle spasms. For a long period of time she refused prescription pain medications, despite her reports of pain levels of up to 8 on a scale of 1 to 10.

...

The claimant continued to her follow up treatment with Dr. Steneker in 2003 and 2004. She was finally prescribed some pain medications including Cioxx and Celebrex, but reported no improvement in her symptoms. Her physical findings were unchanged and the claimant was not referred for any further orthopedic or neurological testing.

Dr. Steneker's opinion about the claimant's ability to work also remained the same, essentially stating that the claimant is unable to perform any work. On February 25, 2004, he stated that the claimant cannot perform any lifting, will never improve, and cannot be helped by any modifications in the work place. On March 31, 2004, he stated that the claimant cannot sit, stand, or walk for more than 30 minutes at a time and cannot sit, stand or walk for more than 3 hours in an 8 hour workday. As noted I do not accord any weight to his urgent advocacy for his patient.

01 . . .

02 In the present case, I find that the opinion of Dr. Steneker should not be given  
03 controlling weight in this decision. Dr. Steneker's conclusions are not well supported  
04 by medically acceptable clinical and laboratory diagnostic techniques and are  
05 inconsistent with other substantial evidence in the record. Dr. Steneker's own physical  
06 examinations have not shown any evidence that the claimant has significant motor  
07 loss, muscle weakness, reflex loss, or sensory loss that would prevent her from  
08 performing any lifting activities. In addition, her x-rays and MRIs have only shown  
09 mild degenerative changes in the spine and moderate changes in the left shoulder.  
10 Consequently, Dr. Steneker appears to have relied entirely on the claimant's  
11 subjective allegations, when he formed his opinions. However, I find that the  
12 claimant's subjective allegations are not entirely credible based on other substantial  
13 evidence in the record.

08  
09 (AR 20, 22-23; internal citations to record and case citations omitted.)

10 Plaintiff avers that the ALJ erred in concluding that Dr. Steneker relied entirely on her  
11 subjective complaints and points to his objective findings, including spasms of the levator scapulae  
12 and trapezius muscles, and signs for subacromial bursitis, rotator cuff syndrome, and tendonitis  
13 in her right shoulder. (*See, e.g.*, AR 236, 241.) (*See also* AR 162 (October 2003 report by Drs.  
14 Valpey and Brigham reflected that imaging studies performed in March 2002 showed  
15 abnormalities in plaintiff's left shoulder and cervical spine).) Plaintiff asserts that, even if Dr.  
16 Steneker's opinions were not entitled to controlling weight, the ALJ actually stated he was giving  
17 them zero weight and essentially found plaintiff had no limitations in the use of her upper  
18 extremities. She maintains that the ALJ failed to provide sufficient reasons for rejecting this  
19 treating physician's opinions and that his opinions should be credited as true.

20 The Commissioner points to findings by Dr. Steneker contradictory to his opinions as to  
21 plaintiff's abilities (*see, e.g.*, AR 241 (finding, *inter alia*, plaintiff's upper and lower reflexes were  
22 1-2 plus and symmetrical; normal hand grip strength, and 5/5 strength in all major muscle groups;

01 and full range of motion in her right shoulder)), and argues that the ALJ appropriately relied on  
02 these contradictions in rejecting Dr. Steneker's opinions. *See Bayliss v. Barnhart*, 427 F.3d 1211,  
03 1216 (9th Cir. 2005) (discrepancy between a doctor's opinion of a claimant's abilities and that  
04 doctor's clinical notes and recorded observations and opinions "is a clear and convincing reason  
05 for not relying on the doctor's opinion."); *accord* Social Security Rulings (SSR) 96-2p. The  
06 Commissioner further avers that the objective findings pointed to by plaintiff reveal only mild to  
07 moderate findings, and that detailed examinations show she had full range of motion in her  
08 shoulders. (*See* AR 180-81, 214-17.) The Commissioner also points to additional evidence of Dr.  
09 Steneker's advocacy, revealed in a letter to the Department of Labor and Industries (L&I) in  
10 which he opined that plaintiff was "definitely disabled and need [sic] to have a Disability Rating  
11 Exam done, which I am happy to perform upon your request[]" (AR 204), and argues that the  
12 opinion of a physician who is acting as an advocate is entitled to less weight. *See Matney v.*  
13 *Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992).

14 In reply, plaintiff notes that, despite some normal testing results, the parties agree that the  
15 record also contains abnormal findings. She argues that Dr. Steneker is the most qualified person  
16 to interpret the physical findings, and that, if the ALJ had questions about whether Dr. Steneker's  
17 physical findings supported the limitations assessed, he could have recontacted Dr. Steneker or  
18 called a medical expert to testify at the hearing. *See* 20 C.F.R. § 404.1512(e). Plaintiff also rebuts  
19 the assertion that Dr. Steneker was acting as an advocate, noting that he saw her on multiple  
20 occasions, rendered his opinions in the course of his treatment, and identified objective findings.  
21 *Cf. Matney*, 981 F.2d at 1020 (physician considered to have acted as an advocate had examined  
22 the claimant only once, produced a brief report, and relied primarily on the medical history and the



01 claimant's subjective complaints). She also clarifies that the letter cited by the Commissioner as  
02 evidence of advocacy was solicited by L&I. (*See* AR 204.)

03 While plaintiff correctly identifies some abnormal objective findings related to her shoulder  
04 and cervical spine, it does not follow that such abnormalities limited plaintiff to the extent opined  
05 by Dr. Steneker. Moreover, the ALJ did acknowledge the existence of the objective findings,  
06 stating: "During her follow up evaluations with Dr. Steneker, the claimant continued to have  
07 multiple somatic complaints, but almost no objective evidence of any impairments other than  
08 muscle spasms." (AR 20.) (*See also* AR 25 ("The claimant displayed some evidence of muscle  
09 spasm and reduced range of motion during her physical examinations, but her muscle strength,  
10 reflexes, and sensation are all normal.")) He nonetheless concluded that Dr. Steneker's physical  
11 examinations did not reveal "significant motor loss, muscle weakness, reflex loss, or sensory loss  
12 that would prevent her from performing any lifting activities[,] and noted that "x-rays and MRIs  
13 have only shown mild degenerative changes in the spine and moderate changes in the left  
14 shoulder." (AR 23.) Therefore, as argued by the Commissioner, the ALJ appropriately relied on  
15 contradictory evidence in the record in rejecting Dr. Steneker's opinions. *See, e.g., Bayliss*, 427  
16 F.3d at 1216.

17 Nor does the ALJ's depiction of Dr. Steneker's "urgent advocacy for his patient[]"   
18 present reversible error. (AR 23.) The Ninth Circuit Court of Appeals has held that, in the  
19 absence of evidence of actual improprieties, an ALJ may not assume doctors routinely lie in order  
20 to help their patients collect disability benefits. *Lester*, 81 F.3d at 832. The Ninth Circuit has also  
21 accepted a physician's lack of objective medical evidence and reliance on subjective complaints  
22 as evidence of actual impropriety, and upheld an ALJ's rejection of a physician's opinion under

01 these circumstances as a permissible credibility determination. *See Saelee v. Chater*, 94 F.3d 520,  
02 521-23 (9th Cir. 1996) (“The ALJ pointed out that Dr. Aleman himself stated that he was unable  
03 to establish any organic basis for most of Saelee’s complaints and that he relied on her subjective  
04 allegations, which the ALJ, in his discretion, disregarded as ‘entirely untrustworthy.’”) In this  
05 case, the ALJ pointed to the minimal amount of objective medical evidence and apparent reliance  
06 on plaintiff’s subjective complaints in rejecting Dr. Steneker’s opinions. ( *See* AR 20, 22-23.)  
07 Also, in criticizing Dr. Steneker’s “urgent advocacy[,]” the ALJ specifically pointed to the fact  
08 that, despite the consistently normal physical findings, Dr. Steneker’s opinions remained decidedly  
09 bleak, including a February 2004 assessment in which he opined that plaintiff could perform “no  
10 lifting[,]” would not be helped by any job modification, and that he would “never” anticipate  
11 altering the “no lifting” restriction. (AR 22-23, 309.) Taken as a whole, these findings suffice to  
12 support the ALJ’s rejection of Dr. Steneker’s opinions based, in part, on his advocacy. (AR 23.)

13 In sum, the ALJ provided sufficient reasons for rejecting the opinions of Dr. Steneker. As  
14 such, the ALJ’s decision with respect to this treating physician should be affirmed.

15 B. Examining Physicians Drs. Raymond Valpey and Lance Brigham

16 Following an Independent Medical Examination requested by L&I on October 23, 2003,  
17 Drs. Raymond Valpey and Lance Brigham found:

18 The worker has limitations and restrictions. She should not be expected to work with  
19 her arms overhead or to do repetitive use of either proximal upper limb. These  
20 limitations are due to the progressive nature of her acromioclavicular joint arthritis  
and impingement syndrome.

21 (AR166.) The ALJ assessed the opinions of these examining physicians as follows:  
22

01 During Dr. Valpey's examination the claimant gave relatively little effort when testing  
02 neck range of motion and had tenderness to extremely light skin palpation. However,  
03 when reexamined by Dr. Brigham she had no tenderness with even moderate  
palpation. Muscle strength, reflexes, and gait were essentially normal with no  
evidence of neurological deficits.

04 Diagnoses included degenerative disc disease in the cervical spine with cervical strain  
05 and bilateral shoulder impingement syndrome with bilateral shoulder strain. An MRI  
06 performed on October 30, 2003 showed only mild degenerative changes in the  
cervical spine.

07 The panel physicians recommended that the claimant avoid working with her arms  
08 overhead or repetitive use of either proximal upper limb. The physicians stated that  
09 they were imposing these limits due to the progressive nature of the claimant's  
10 shoulder impairment, but noted that the claimant's radiographic findings themselves  
did not translate into any impairment rating. A limitation in standing was also  
suggested due to the claimant's subjective complaints, but the evaluators noted that  
they could not find any impairment that would limit the claimant's ability to stand.

11 I have considered the opinion of the panel physicians, but give them little weight in  
12 this decision. Their opinion is inconsistent with the objective medical evidence, which  
13 shows no significant neurological findings or degenerative changes that would limit  
the claimant's ability to use her arms. Further, within their own assessment these  
physicians state that the claimant's degenerative changes are minor and her limitations  
of motion appear to be voluntary.

14 (AR 21; internal citations to record omitted.)

15 Plaintiff argues that the ALJ failed to provide specific and legitimate reasons for rejecting  
16 the opinions of Drs. Valpey and Brigham. She avers no basis for the assertion that she must have  
17 neurological findings in order to establish limitations in the use of her arms. She further rejects  
18 the ALJ's assertion as to a lack of objective medical evidence of degenerative changes, asserting  
19 that her severe degenerative disease of the cervical spine and left shoulder impingement syndrome  
20 could be expected to cause upper extremity pain and limit the use of her arms. Finally, plaintiff  
21 notes that the finding as to "minor" degenerative changes related solely to her cervical spine, not  
22 her shoulders, and that Drs. Valpey and Brigham based their limitations on her shoulder problems.

01 (See AR 166 (“With regard to the cervical spine, her level of impairment would be the equivalent  
02 of Category 1 of cervical impairment. Examination shows no evidence of radiculopathy or other  
03 neurologic impairments resulting from the minor degenerative changes seen on imaging studies.  
04 Her limitation of motion appears voluntary.”; stating that arm limitations “are due to the  
05 progressive nature of her acromioclavicular joint arthritis and impingement syndrome.”))

06 In response, the Commissioner reiterates the ALJ’s findings. He argues that the ALJ  
07 appropriately pointed to contradictions between the doctors’ opinions as to plaintiff’s abilities and  
08 their own notes and recorded observations and opinions, *Bayliss*, 427 F.3d at 1216, as well as  
09 their reliance on plaintiff’s subjective complaints, *Morgan v. Commissioner*, 169 F.3d 595, 600-02  
10 (9th Cir. 1999) (citing *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)).

11 The ALJ’s assessment of the opinions of Drs. Valpey and Brigham is problematic in several  
12 respects. First, in criticizing the finding that the assessed limitations derived from the progressive  
13 nature of plaintiff’s shoulder impairment, the ALJ relies on the notation that “[t]he radiographic  
14 findings themselves do not translate into an impairment rating” (AR 166), without any explanation  
15 as to such an “impairment rating” and its significance and/or similarity, if any, to the disability  
16 assessment pertinent to plaintiff’s DI benefits claim. Second, as argued by plaintiff, the minor  
17 degenerative changes noted by these physicians related solely to her cervical spine, while the  
18 limitations were assessed solely in relation to her shoulder impairments. (*See id.*) Third, while the  
19 ALJ may have appropriately determined that the record lacked evidence of significant neurological  
20 findings or degenerative changes limiting plaintiff’s use of her arms, he failed to address the  
21 significance of the opinion that the assessed limitations were based on the *progressive* nature of  
22 plaintiff’s shoulder impairments. That is, it is not entirely clear whether Drs. Valpey and Brigham

01 found plaintiff incapable of repetitively using her upper limbs or reaching overhead, or whether  
02 they advised against such usage in order to avoid further deterioration. As reflected below, any  
03 restriction on plaintiff's use of her arms implicates the ALJ's RFC assessment and any findings at  
04 steps four and five.

05 Given the above, the undersigned concludes that the ALJ's assessment of the opinions of  
06 Drs. Valpey and Brigham is not supported by substantial evidence. On remand, the ALJ should  
07 reassess the opinions of these examining physicians.<sup>2</sup>

08 Credibility

09 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
10 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*  
11 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an  
12 ALJ must render a credibility determination with sufficiently specific findings, supported by  
13 substantial evidence. "General findings are insufficient; rather, the ALJ must identify what  
14 testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81  
15 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her  
16 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings."  
17 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the  
18 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between  
19 his testimony and his conduct, his daily activities, his work record, and testimony from physicians  
20 and third parties concerning the nature, severity, and effect of the symptoms of which he

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21  
22 <sup>2</sup> Plaintiff did not argue and the undersigned does not find that the opinions of Drs. Valpey  
and Brigham should be credited as true.

01 complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

02       The ALJ found plaintiff’s testimony not credible to the extent that it may be interpreted  
03 to mean that she has pain and other functional limitations so severe as to preclude all work  
04 activity. (AR 28.) He explained and supported this finding as follows:

05       The claimant testified at the hearing that she is unable to work because of pain in her  
06 neck and shoulders caused by bursitis and arthritis. She described her shoulder pain  
07 as jabbing and stabbing and stated that it is worse on the left side. She noted that her  
08 pain is so severe it interferes with her sleep. Therefore, she needs to nap during the  
09 day because of fatigue. The claimant also claimed that she has tingling and numbness  
in her extremities and cannot lift her arms above her head. She reported that she still  
sees Dr. Steneker twice a month, but mainly goes to these appointments because it  
is required by L&I. She has not sought any additional treatment from a specialist such  
as an orthopedic surgeon.

10       The claimant testified that she takes anticonvulsants, due to her history of a seizure  
11 in the hospital after her surgery. However, she has not had a seizure since she left the  
12 hospital. The claimant did state however that she has problems concentrating, forgets  
13 things, and still requires the occasional use of a cane to help her walk because of  
14 balance problems. The claimant noted that these problems did not exist before her  
15 surgery, which leads to the conclusion that the claimant feels these symptoms are  
related to her brain tumor and surgery. There is no demonstration in the record that  
claimant requires a cane for balance, and there is no indication that her alleged  
memory problems or concentration difficulties are any different from those of other  
people of advancing age. The psychiatrist who examined her, Dr. Jarvis, found no  
evidence of any mental limitations.

16       In regard to her activities of daily living, the claimant testified that she lives with her  
17 daughter who moved in after her brain surgery in January 2003. She stated that she  
18 likes to read and tries to walk around her circular driveway a couple of times a day.  
19 The claimant reported that she cannot perform any household chores or cooking, and  
20 her daughter does all of this work. In addition, she stated that she must make sure her  
21 daughter is home before she takes a shower, due to her tendency to lose her balance.  
22 The claimant did not make any mention of her granddaughter or any activities  
involving her granddaughter. These reports are inconsistent with the reports she made  
to Dr. Jarvis. I accord no weight to claimant’s changed reports and the fact of those  
inconsistencies renders her entire reportage unreliable. Discrepancy between earlier  
recorded statements and testimony at hearing may provide grounds to disbelieve later  
testimony.

01 The claimant is a 55 year old female with college level education and past work  
02 experience as a cashier and molder. Her earnings records show a good work history  
03 prior to the alleged onset date of disability. However, the earnings records also  
04 establish that the claimant averaged approximately \$20,000 to 30,000 in income in the  
05 10 years prior to her alleged onset date. During the hearing, she testified that her L&I  
06 benefit is approximately \$19,000 per year, which compares favorably with the  
claimant's earnings level in the 10 years prior to her alleged onset date. Motivation  
and the issue of secondary gain can be considered when assessing a claimant's  
credibility. In this case, the fact that the claimant is receiving almost the same financial  
benefit when not working as she did when working full time suggests that she may not  
be highly motivated to return to work.

07 The objective medical evidence, when considered as a whole, does not support a  
08 finding that the claimant's medical impairments would cause the degree of limitations  
09 alleged. The claimant testified during the hearing that she has severe pain in her neck  
10 and shoulders. She stated that she is shaky on her feet, cannot walk over rough  
11 surfaces, and requires a cane to aid ambulation at times. The claimant also reported  
that she has tingling and numbness in her extremities, cannot lift her hands above her  
head, cannot sleep at night due to her pain, and needs to nap during the day because  
of fatigue.

12 However, the claimant's physical examinations and diagnostic testing are  
13 unremarkable. MRIs and X-rays show only moderate degenerative changes in the left  
14 shoulder, no degenerative changes in the right shoulder, and mild degenerative  
changes in the cervical spine. The claimant has displayed some evidence of muscle  
spasm and reduced range of motion during her physical examinations, but her muscle  
strength, reflexes, and sensation are all normal. There are no neurological deficits.

15 Although the claimant did have a brief problem with her ability to ambulate  
16 immediately after her brain surgery, these [sic] quickly improved, and there has not  
been any evidence of gait problems since March 2003.

17 No physician has recommended the claimant use a cane to aid ambulation and no  
18 physician has ever reported a physical impairment that would impact the claimant's  
ability to walk.

19 The claimant has also received relatively conservative treatment for her impairments  
20 considering the severity of her allegations. The claimant has received the bulk of her  
21 treatment from Dr. Steneker, a primary care physician who has accepted her  
subjective complaints without question.

22 Despite finding the claimant unable to sit, stand, or walk for more than 30 minutes at  
a time, Dr. Steneker has not referred the claimant for any further neurological or



01 orthopedic testing.

02 The claimant likewise has not sought any additional treatment, except for a second  
03 opinion, during which the claimant appeared much more interested in qualifying for  
disability insurance than she did in treating her pain.

04 The claimant also testified at the hearing that she has concentration deficits and  
05 memory loss. She noted that these limitations did not exist prior to her brain tumor  
and surgery. However this testimony is in sharp contradiction to her reports to her  
treating neurologist and consultive examiners.

06 In May 2003, the claimant's neurologist stated that the claimant was alert and able to  
07 answer question and follow commands without any difficulties. During follow up  
08 examinations performed in 2004, the claimant did not report any problems to the  
contrary.

09 Similarly in October 2003, the claimant told Dr. Jarvis that she had experienced a brief  
10 problem with memory after her brain surgery, but has recovered "pretty good" within  
a few months. Dr. Jarvis's mental status examination did not show any evidence of  
11 deficits in memory, concentration, or attention. The claimant could make change,  
perform serial sevens, and think abstractly. The inconsistencies in the claimant's  
12 statements during the hearing and those made to her physicians call into question the  
validity of her testimony.

13 The claimant has also made inconsistent statements regarding her activities of daily  
living. The claimant testified at the hearing that she is quite limited, requiring her  
14 daughter to perform all of the household chores, cooking and cleaning. However,  
during her consultive examination with Dr. Jarvis in October 2003, the claimant  
15 reported that she takes care of her own self care tasks without difficulty and does her  
own cooking, shopping, and light housekeeping. In addition, she was quite involved  
16 with her granddaughter, getting her up and off to school in the morning, attending her  
Tae Kwon Do lessons twice a week, and helping her with homework most nights. The  
17 claimant was also reading, gardening, watching television, socializing, and going to  
movies. Instead of being severely limited, the claimant's reports to Dr. Jarvis indicate  
18 that she is able to perform most activities of daily living without difficulty.

19 (AR 23-26; internal citations to record and case citations omitted.) The ALJ also found evidence  
20 of plaintiff's refusal of pain medication or injections to detract from her credibility. (*See* AR 20  
21 ("For a long period of time she refused prescription pain medications, despite her reports of pain  
22 levels of up to 8 on a scale of 1 to 10. . . . This refusal of pain medication in the context of such



01 a degree of pain detracts from the credibility of her allegations.”) and AR 22 (“Dr. Kuehl noted  
02 that the claimant showed no interest when asked if she would like injections for her pain. . . . This  
03 disinterest does not enhance her credibility.”))

04 Plaintiff first counters the ALJ’s comments regarding pain medication with evidence to the  
05 contrary. (*See, e.g.*, AR 218 (April 25, 2003 report, which was cited to by the ALJ, indicates that  
06 Dr. Steneker prescribed “NSAIDs [nonsteroidal anti-inflammatory drugs] PRN, but that plaintiff  
07 declined “any pain medications at this point in time otherwise.”); AR 211 (May 12, 2003 report  
08 by Dr. Steneker indicates that he prescribed NSAIDs and “[m]edication management including  
09 Ultram 1-2 PO QUID PRN.”)) (*See also* Dkt. 14 at 16-17 (providing numerous citations to the  
10 record to support the contention that it appears that plaintiff was taking pain medication during  
11 the entire time period at issue).) She next disputes the ALJ’s reliance on her daily activities,  
12 asserting that he failed to accurately characterize either her reports to Dr. Jarvis or her testimony  
13 at the hearing. (*See, e.g.*, AR 170-71 (for example, plaintiff reported to Dr. Jarvis: ““Then I try  
14 to clean my kitchen. Sometimes it takes me a couple of days. I have to cut the laundry in half to  
15 do it. It hurts my shoulders.”; ““My daughter comes and drives me to the grocery and helps if  
16 it’s a big meal.”; “Light housekeeping. I can’t vacuum. I get all swollen up.”); and AR 331  
17 (plaintiff’s testimony, described *infra* at p. 18-19).) She asserts that, with respect to daily  
18 activities, the question is whether an individual ““is able to spend a *substantial part* of [her] day  
19 engaged in pursuits involving the performance of physical functions that are transferable to a work  
20 setting,”” and that one need not be ““utterly incapacitated’ in order to be disabled.” *Vertigan*, 260  
21 F.3d at 1049-50 (quoting *Morgan*, 169 F.3d at 600 and *Fair*, 885 F.2d at 603). Plaintiff also  
22 argues that, because no physician has opined that she is malingering or motivated by secondary

01 gain, the ALJ's conclusion that she may not be highly motivated to return to work is speculative  
02 and not supported by substantial evidence.

03 Finally, plaintiff takes issue with the ALJ's conclusion that "[t]he objective medical  
04 evidence, when considered as a whole, does not support a finding that the claimant's medical  
05 impairments would cause the degree of limitations alleged." (AR 24.) She asserts that an  
06 individual alleging disability based on subjective symptoms need only show (1) objective medical  
07 evidence of an underlying impairment and (2) that the impairment could reasonably be expected  
08 to produce *some* degree of symptom. *See Smolen v. Chater*, 80 F.3d 1273, 1281-82 (9th Cir.  
09 1996). Plaintiff adds that, with respect to the latter showing, an individual need not show that her  
10 impairment could be expected to cause the severity of the symptom alleged, only that it could have  
11 caused some degree of the symptom. *Id.* at 1282.

12 As argued by plaintiff, it does appear that the ALJ failed to accurately characterize her  
13 testimony at the hearing. Contrary to the ALJ's contention (*see* AR 24-25), plaintiff did not testify  
14 that she could not perform any household chores or cooking, and that her daughter does all of this  
15 work. She testified that vacuuming, getting laundry out of the washing machine, and doing dishes  
16 exacerbated her shoulder pain, and that her daughter "generally" cooked dinner. (AR 331-32.)  
17 Also, plaintiff did mention her granddaughter (*see* AR 323), and while she did not discuss any of  
18 her activities involving her granddaughter, there were no questions asked that would have elicited  
19 such a response. That is, instead of a question as to how she spent a typical day, there was one  
20 general question as to what she was doing with her time – to which she answered reading – and  
21 a series of specific questions, including what she did for exercise, whether she had any trouble  
22 bathing or getting dressed, what activities exacerbated her shoulder and foot pain, what her

01 sleeping and rest patterns were, and whether she had any restrictions in her ability to drive and  
02 shop. (*See* AR 324, 330-34.)

03         On the other hand, despite omitting some details regarding her daughter's involvement,  
04 the ALJ accurately described plaintiff's reports to Dr. Jarvis. (*See* AR 25-26 and 170-71.) While  
05 "the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping,  
06 driving a car, or limited walking for exercise, does not in any way detract from her credibility as  
07 to her overall disability[.]" *Vertigan*, 260 F.3d at 1049, the ALJ here pointed to evidence of more  
08 extensive activities, including "getting her [granddaughter] up and off to school in the morning,  
09 attending her Tae Kwon Do lessons twice a week, and helping her with homework most nights[.]"  
10 as well as "reading, gardening, watching television, socializing, and going to movies." (AR 26.)  
11 Plaintiff does not demonstrate that the ALJ erred in considering these activities in his credibility  
12 assessment. *See, e.g., Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (noting the ALJ's  
13 citation to the claimant's extensive daily activities and finding: "It is true that Rollins' testimony  
14 was somewhat equivocal about how regularly she was able to keep up with all of these activities,  
15 and the ALJ's interpretation of her testimony may not be the only reasonable one. But it is still a  
16 reasonable interpretation and is supported by substantial evidence; thus, it is not our role to  
17 second-guess it.")

18         Additionally, while the record does show that plaintiff utilized pain medication, it also  
19 reflects, as indicated by the ALJ, that she once declined any pain medication beyond NSAIDs on  
20 an as needed basis, and was once "reluctant to getting injections for pain." (AR 218 and 250.)  
21 Nor does plaintiff demonstrate error in the ALJ's discussion of motivation and secondary gain.  
22 The ALJ supported his finding that plaintiff "may not be highly motivated to return to work[.]"

01 with evidence that she was receiving almost the same amount in workers' compensation benefits  
02 as she did while working full time. (AR 24.) He also pointed to evidence from Dr. Kuehl that  
03 plaintiff "appeared much more interested in qualifying for disability insurance benefits than she did  
04 in treating her pain." (AR 25 (citing AR 251 (Dr. Kuehl stated in her November 24, 2003 report:  
05 "Discussed options with the patient including anti-inflammatory medications, more physical  
06 therapy or referral to a specialist for further work. The patient is reluctant to pursue any of these  
07 options. She is mostly interested in completing disability paperwork.")))

08 Finally, plaintiff fails to demonstrate error in the ALJ's reliance on a lack of supportive  
09 objective medical evidence. Where the record shows "the existence of a medically determinable  
10 impairment that could reasonably give rise to the reported symptoms, an ALJ must make a finding  
11 as to the credibility of the claimant's statements about the symptoms and their functional effect."  
12 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (citing SSR 96-7p). An ALJ may  
13 not reject subjective pain testimony based solely on a lack of objective evidence fully corroborating  
14 the alleged severity of the pain. *Id.*; *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991).  
15 Moreover, in the absence of evidence of malingering, an adverse credibility finding must be  
16 accompanied by specific findings and supported by clear and convincing reasons. *Robbins*, 466  
17 F.3d at 883 (citing *Smolen*, 80 F.3d at 1283-84). Also, the medical evidence remains "a relevant  
18 factor in determining the severity of the claimant's pain and its disabling effects." *Rollins*, 261  
19 F.3d at 857. In this case, the ALJ did not rely solely on a lack of supporting objective medical  
20 evidence in rejecting plaintiff's subjective pain testimony. Instead, as reflected in the extensive  
21 credibility assessment excerpted above, he made numerous specific findings and provided clear and  
22 convincing reasons to support his decision.

01 In sum, the Court agrees with plaintiff as to an error in the ALJ's credibility assessment  
02 in only one respect. As noted by the Commissioner, a single error need not negate the validity of  
03 an ALJ's ultimate credibility conclusion otherwise supported by substantial evidence. *See Batson*  
04 *v. Commissioner, Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004). However, in this case,  
05 the undersigned finds the ALJ's mischaracterization of plaintiff's testimony sufficiently significant  
06 so as to warrant further consideration of plaintiff's credibility. Additionally, given the other errors  
07 addressed herein, the ALJ's credibility assessment may be implicated and require further  
08 consideration on remand. Accordingly, on remand, the ALJ should reassess plaintiff's credibility  
09 with specific emphasis on plaintiff's actual testimony at the hearing and on any effect stemming  
10 from further consideration of the other issues addressed herein.

#### 11 Lay Witness Testimony

12 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability  
13 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The  
14 ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each witness.  
15 *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members because, *inter*  
16 *alia*, they were "understandably advocates, and biased" amounted to "wholesale dismissal of the  
17 testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to  
18 each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).  
19 *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("[L]ay testimony as to a claimant's  
20 symptoms is competent evidence that an ALJ must take into account, unless he or she expressly  
21 determines to disregard such testimony and gives reasons germane to each witness for doing so.")  
22 Moreover, as recently found by the Ninth Circuit: "[W]here the ALJ's error lies in a failure to

properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination.” *Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

Here, plaintiff’s sister, Janet Leone, stated that plaintiff was “very limited,” noting limitations stemming from her shoulder impairment and that plaintiff had to write down things to remember and is confused by changes in routine. (AR 92-98.) The ALJ considered this testimony and found:

I am unable to credit this lay testimony in this matter as probative in terms of the ultimate issue of disability in light of the medical and other factors of this case. One reason for which an ALJ may discount lay testimony is that it conflicts with medical evidence. Material inconsistencies between claimant’s testimony and other evidence in the record are “germane” to discounting lay testimony.

...

I conclude that the lay testimony in this case cannot outweigh my analysis of the objective clinical and laboratory evidence, and medical opinion of record, and of claimant’s own credibility. In other words, as the trier of fact in this matter, I find the subjective elements of proof offered in this case, even with lay corroboration of activities and behavior, cannot carry claimant’s burden of proof of disability.

(AR 26-27; internal citations to record and case citations omitted.)

Plaintiff argues that the ALJ did not provide germane reasons to discount the lay witness testimony. The Commissioner asserts that the ALJ properly discounted the testimony as conflicting with the medical evidence. *See, e.g.,* Lewis, 236 F.3d at 511. However, the ALJ failed to explain how the lay witness testimony conflicts with the medical evidence. In fact, he did not point to any specific medical evidence inconsistent with the testimony. As a result, the ALJ failed to provide a sufficiently specific germane reason for the rejection of this testimony. Accordingly, the ALJ

01 should reassess the lay witness testimony on remand.

02 Past Relevant Work

03 At step four, the ALJ found as follows:

04 The claimant retains the ability to perform the exertional and requirements of most  
05 light work. She can lift and carry up to 10 pounds frequently and up to 20 pounds  
06 occasionally. In addition, she is able to sit stand, and walk for about 6 hours in an 8  
07 hour work day, but should only perform occasional climbing of ladders, ropes and  
scaffolds. The claimant should avoid concentrated exposure to hazardous working  
conditions, such as working at heights or around dangerous machinery. The claimant  
does not have any limitations in her ability to reach or use her arms repetitively.

08 The next issue to be considered is whether the claimant is able to perform her past  
09 relevant work given her current residual functional capacity. The claimant's past  
relevant work as a molder and cashier are both performed in the national economy at  
10 a light exertional level. The job of molder ([Dictionary of Occupational Titles (DOT)]  
739.687-030 and 779.684-050) would require the claimant to work around moving  
11 machinery, which the claimant should avoid, and she would not be able to return to  
this type of work.

12 However, the claimant could perform her past relevant work as a cashier (DOT  
211.462-010). The claimant reported that when she performed this job she was not  
13 required to do any lifting of more than 10 pounds, never reached for more than 10  
minutes, and always had help carrying groceries to the shelves. Consequently, even  
14 if I gave full credence to the claimant's allegations that she cannot reach overhead  
with her arms; she would still be able to perform her past work as previously  
15 performed.

16 (AR 27-28; internal citations to record omitted.)

17 Plaintiff maintains that the ALJ erred in determining that she could return to her past  
18 relevant work as a cashier because it is not clear that this job qualifies as past relevant work. Social  
19 Security regulations provide that work performed more than fifteen years prior to the date of  
20 adjudication is not relevant at step four. *See* 20 C.F.R. § 416.965(a). Plaintiff argues that the  
21 record does not establish whether she worked as a cashier since February 6, 1990 – fifteen years  
22 from the date of the ALJ's February 6, 2005 decision.

01 In making his step four decision, the ALJ cited a work history report filled out by plaintiff.  
02 (*See* AR 28.) In that report, plaintiff stated that she worked as a molder for Pacific Research from  
03 October 2000 to “now,” and worked as a cashier at a BP gas station from the summer of 1998 to  
04 1999. (AR 78.) Plaintiff argues that other evidence in the record contradicts this work history  
05 report. For example, in an October 23, 2003 examination, plaintiff reported that she began  
06 working as a molder in 1990 and previously “had held a couple of cashier jobs.” (AR 161, 163.)  
07 In an examination on the following day, she reported that she had worked as a molder for twelve  
08 years. (*See* AR 170.) Other records reflect that plaintiff worked at Pacific Research as a molder  
09 from October 1990 to February 1, 2002 and as a small products assembler from February 1, 2002  
10 to July 11, 2002, and worked as a cashier, or grocery and gas clerk, from 1988 to 1991. (*See* AR  
11 302, 304 and 306.)

12 However, as argued by the Commissioner, plaintiff fails to demonstrate that the ALJ erred  
13 in finding plaintiff had past relevant work as a cashier. The ALJ appropriately relied on a work  
14 history report plaintiff filled out and in which she described her cashier job in detail. (*See* AR 80.)  
15 *Cf.* SSR 82-62 (“The claimant is the primary source for vocational documentation, and statements  
16 by the claimant regarding past work are generally sufficient for determining the skill level;  
17 exertional demands and nonexertional demands of such work.”) The undersigned further notes  
18 that a tax report included in the record shows substantial earnings in 1998 and 1999, but almost  
19 no earnings from 1988 to 1990, the period of time during which she alleged in another report that  
20 she worked as a cashier. (*See* AR 58-60.) Also, although the allegedly contradictory evidence  
21 pointed to by plaintiff did not include her cashier job in 1998 and 1999, it did not exclude the  
22 possibility that her job at Pacific Research was not continuous and that she performed another job



01 during her twelve years as a molder. At the same time, because the ALJ will need to reassess  
02 plaintiff's ability to perform work as a cashier for the reason identified below, he should also take  
03 the opportunity to confirm whether she, in fact, actually has this past relevant work.

04 During oral argument, plaintiff noted that, although the ALJ cited relevant DOT provisions  
05 in his step four analysis, he also specifically relied on plaintiff's own job description in the work  
06 history report in determining her ability to work as a cashier. ( *See* AR 28 (citing AR 80).)  
07 Plaintiff points out that, based on the work history report, her cashier job required her to stand  
08 eight to nine hours per day. ( *See* AR 80). She argues that, because the ALJ found she could only  
09 sit, stand, and walk for about six hours in an eight hour work day, she is not able to perform the  
10 cashier job as previously performed.

11 As stated in SSR 82-61:

12 Under sections 404.1520(e) and 416.920(e) of the regulations, a claimant will be  
13 found to be "not disabled" when it is determined that he or she retains the RFC to  
14 perform: 1. The actual functional demands and job duties of a particular past relevant  
15 job; or 2. The functional demands and job duties of the occupation as generally  
16 required by employers throughout the national economy.

17 "[The Ninth Circuit has] never required explicit findings at step four regarding a claimant's past  
18 relevant work both as generally performed *and* as actually performed." *Pinto v. Massanari*, 249  
19 F.3d 840, 845 (9th Cir. 2001). However, the ALJ is not "in any way relieved of his burden to  
20 make the appropriate findings to insure that the claimant really can perform his or her past relevant  
21 work." *Id.* Also, while the ALJ "may rely on the general job categories of the [DOT] . . . as  
22 presumptively applicable to a claimant's prior work[,]" the claimant "may overcome the  
presumption that the [DOT's] entry for a given job title applies to him by demonstrating that the  
duties in his particular line of work were not those envisaged by the drafters of the category." *Villa*



01 administrative proceedings.

02 DATED this 20th day of July, 2007.

03 

04 Mary Alice Theiler  
05 United States Magistrate Judge  
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